

83 - 331

Office-Supreme Court, U.S.
FILED

AUG 29 1983

ALEXANDER L. STEVAS,
CLERK

DOCKET NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

In the Matter of the Application

of

KATHY SHIRILLA, as Personal
Representative of the Estate
of Donald Andrew Taylor,
Deceased,

Petitioners,

vs.

CLAY SMALLWOOD, et al,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

DOUGLAS A. HALDANE
Counsel of Record
for Petitioner
P.O. Box 11544
Eugene, OR 97440
(503) 342-7015

LYLE C. VELURE
Attorney for Petitioner
P.O. Box 7275
Eugene, OR 97401
(503) 342-7015

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

KATHY SHIRILLA, as Personal
Representative of the Estate
of Donald Andrew Taylor,
Deceased,

Petitioner,

vs.

CLAY SMALLWOOD, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Kathy Shirilla respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 31, 1983.

QUESTIONS PRESENTED

1. Has the Court of Appeals for the Ninth Circuit failed to follow the analysis established by this Court in determining the most analogous statute of limitations to apply

to an action brought under 42 U.S.C. § 1983, in that it has failed to characterize the nature of the federal claim and the federal policies involved?

2. Has the Court of Appeals for the Ninth Circuit allowed the Oregon Legislature to dictate to that court the limits to be placed on the enforcement of a federal right?

3. Has the Court of Appeals for the Ninth Circuit applied the wrong Oregon Statute of Limitations to an action brought under 42 U.S.C. § 1983, because the statute which was applied is not the most analogous state statute?

4. Whether in applying Oregon's two-year statute of limitations to this action brought under 42 U.S.C. § 1983 the Court of Appeals for the Ninth Circuit has applied a statute which is inconsistent with the federal policies of 42 U.S.C. § 1983?

PARTIES TO THE PROCEEDING

Additional Defendants not listed in the

caption:

Gerry Riste

Verlon Denton

Thomas Henderson

Ted Hawkinson

Gary Findley

Sam Dotson

A.D. Insley

Robert Schlander

William Wallace

Fred Hunt

Donald Smith

State of Oregon

Curry County

City of Brookings

TABLE OF CONTENTS

	Page
Questions Presented.	1
Parties to the Proceeding.	2
Table of Authorities	5
Opinions Below	7
Jurisdiction	7
Constitutional & Statutory Provisions.	7
Statement of the Case.	13
Reasons for Granting Certiorari: . . .	15
1. The decision below conflicts with decisions of this Court as to the proper analysis to be used in determining the most analogous state statute of limitations to apply to an action arising under 42 U.S.C. § 1983. . .	16
2. The decision below conflicts with the decisions of other courts of appeals as to the proper analysis to be employed in determining the appropriate statute of limitations to be applied in an action arising under 42 U.S.C § 1983.	18
3. The decision below raises a significant and possibly far reaching question concerning the ability of the state to limit its liability for constitutional torts in a manner which so far departs from the accepted and usual course of judicial pro-	

	Page
ceedings as to call for an exercise of this Court's power of supervision.	21
Conclusion	26
Appendix.	A-1
Memorandum decision of the Court of Appeals for the Ninth Circuit. . . .	A-1
Order of the U.S. Court for the District of Oregon.	A-2
Findings and Recommendations of Magistrate	A-3

TABLE OF AUTHORITIES

CASES	Page
<u>Almond v. Kent</u> , 459 F.2d 200 (4th Cir. 1972)	19
<u>Board of Regents v. Tomanio</u> , 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed2d 440 (1980)	16, 17, 18
<u>Campbell v. Haverhill</u> , 155 U.S. 610, 15 S. Ct. 217, 39 L.Ed 280 (1895)	20
<u>Clark v. Musick</u> , 623 F.2d 89 (9th Cir. 1980)	25
<u>Davis v. United States Steel Supply</u> , 581 F.2d 335 (3rd Cir. 1978)	17, 18
<u>Donovan v. Reinbold</u> , 433 F.2d 738 (9th Cir. 1970)	23
<u>Garmon v. Foust</u> , 668 F.2d 400 (8th Cir. 1982) <u>cert den</u> , U.S. _____, 102 S.Ct. 2283, 73 L.Ed2d 1294 (1982)	18
<u>Johnson v. Davis</u> , 582 F.2d 1316, (4th Cir. 1978)	19, 20, 21
<u>Knoll v. Springfield Township School District</u> , 699 F.2d 137, (3rd Cir. 1983)	18, 25
<u>Kosikowski v. Bourne</u> , 659 F.2d 105 (9th Cir. 1981)	14, 15, 17, 24 25, 26
<u>Loiseau v. Department of Human Resources</u> , 558 F.Supp 521 (D.C. Or 1983)	24

<u>Monroe v. Pape</u> , 365 U.S. 167, 81 S. Ct. 473, 5 L.Ed2d 492 (1961) . . .	22, 23
<u>O'Sullivan v. Felix</u> , 233 U.S. 318, 34 S. Ct., 596, 58 L.Ed2d 980 (1914)	16
<u>Rosales v. Lewis</u> , 454 F.Supp 956 (D.C.S.D. Iowa 1978)	18
<u>United Parcel Service, Inc. v. Mitchell</u> , 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed2d 732 (1981)	16, 18

CONSTITUTIONAL PROVISIONS

United States Constitution Amendment XIV 11, 14

STATUTORY PROVISIONS

28 U.S.C. § 1254	7
28 U.S.C. § 1331	14
28 U.S.C. § 1343	14
42 U.S.C. § 1983 . . 2, 3, 11, 14, 15, 16, 17, 18, 19, 21, 22, 23, 25	
42 U.S.C. § 1988	12, 16, 25

Oregon Revised States (ORS)

ORS 30.020	7, 14, 20
ORS 30.265	8, 17
ORS 30.275	10, 15

OPINIONS BELOW

The unpublished memorandum of the Court of Appeals appears in the Appendix to this Petition. The District Court for the District of Oregon did not render an opinion in this case. It did adopt the Findings and Recommendations of Magistrate Hogan. A copy of the Magistrate's Findings and Recommendations also appears in the Appendix of this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 31, 1983. This petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

ORS 30.020 Action for wrongful death; when commenced; damages. (1) When the death of a person is caused by the wrongful act or omission of another, the personal representative of the decedent, for the benefit of the decedent's surviving spouse, surviving children, surviving parents and other individuals, if any, who under the law of intestate succession of the state of the decedent's domicile would be entitled to inherit the personal property of the decedent, may maintain an action against the wrongdoer, if the decedent might have maintained an action,

had he lived, against the wrongdoer for an injury done by the same act or omission. The action shall be commenced within three years after the occurrence of the injury causing the death of the decedent.

ORS 30.265 Scope of liability of public body, officers, employes and agents. (1) Subject to the limitations of ORS 30.260 to 30.300, every public body is liable for its torts and those of its officers, employes and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598. As used in ORS 30.260 to 30.300, "tort" includes any violation of 42 U.S.C. § 1983.

(2) Every public body is immune from liability for any claim for injury to or death of any person or injury to property resulting from an act or omission of an officer, employee or agent of a public body when such officer, employee or agent is immune from liability.

(3) Every public body and its officers, employes and agents acting within the scope of their employment or duties, or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598, are immune from liability for:

(a) Any claim for injury to or death of any person covered by workers' compensation law.

(b) Any claim in connection with the assessment and collection of taxes.

(c) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.

(d) Any claim which is limited or barred by the provisions of any other statute.

(e) Any claim arising out of riot, civil commotion or mob action or out of any act or omission in connection with the prevention of any of the foregoing.

(f) Any claim arising out of an act done or omitted under apparent authority of law, resolution, rule or regulation which is unconstitutional, invalid or inapplicable except to the extent that they would have been liable had the law, resolution, rule or regulation been constitutional, valid and applicable, unless such act was done or omitted in bad faith or with malice.

(4) ORS 30.260 to 30.300 do not apply to any claim against any public body or its officers, employees or agents acting within the scope of their employment arising before July 1, 1968. Any such claim may be presented and enforced to the same extent and subject to the same

procedure and restrictions as if ORS 30.260 to 30.300 had not been adopted.

(5) The amendment to ORS 30.270 and 30.285 enacted by chapter 609, Oregon Laws 1975, do not apply to any claim against the state or its officers, employees or agents acting within the scope of their employment or duties arising before July 2, 1975. Any such claim may be presented and enforced to the same extent and is subject to the same restrictions as if chapter 609, Oregon Laws 1975, had not been adopted, but the procedure set forth in ORS 278.120 shall be applicable thereto.

(6) ORS 30.287 and the amendments to ORS 30.270 and 30.285 enacted by chapter 609, Oregon Laws 1975, do not apply to any claim against any local public body or its officers, employees or agents acting within the scope of their employment or duties, arising before December 31, 1975. Any such claim may be presented and enforced to the same extent and subject to the same restrictions as if chapter 609, Oregon Laws 1975, had not been adopted.

ORS 30.275 Notice of claim; time of notice; time of action.

(8) Except as provided in ORS 12.120 and 12.135, but notwithstanding any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action, an action arising from any act or

omission of a public body or an officer, employe or agent of a public body within the scope of ORS 30.260 to 30.300 shall be commenced within two years after the alleged loss or injury.

United States Constitution Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988

Proceedings in vindication of civil rights; attorney's fees.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and the Title "CIVIL RIGHTS," and the Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and states of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the

said courts in the trial and disposition of the cause, and, if it is a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 198, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

On January 13, 1978, Petitioner's decedent Donald Andrew Taylor was lawfully operating his automobile on a public road near the City of Brookings in Curry County, Oregon, when a Curry County deputy sheriff, dressed in plain clothes, stepped in the path of the vehicle, pointed a shotgun at Taylor, and commanded him to stop. (R. 30, p. 4). He was forced off the roadway, drove back on the roadway, but was rammed in the side by a Curry County Sheriff patrol car which had been hidden alongside the road. Another deputy, also in plain clothes, aimed a gun at Taylor and ordered him to stop. While Taylor was complying with the command, and slowing his vehicle to a stop, a third deputy shot Taylor three times in the back

through the rear of the car with a high powered rifle. (R. 30, pp. 4 and 5). Taylor died of his wounds at the scene of the shooting.

Petitioner alleges that the Defendants conspired to and did violate the rights of her decedent as secured by the constitution of the United States, depriving him of his life without due process of law, by summarily executing decedent Taylor, United States Constitution Amendment XIV.

Pursuant to ORS 30.020, which provides for the institution of actions for wrongful death by a personal representative within 3 years of an alleged tortious homicide, Petitioner filed an action for damages and demand for jury trial under 42 U.S.C. § 1983 in the United States District Court for the District of Oregon on January 12, 1981. Jurisdiction is based on that statute and 28 U.S.C. §§ 1331 and 1343.

Defendants moved to dismiss Petitioner's amended complaint on the ground that the action was barred by the two-year statute of limitations contained in the Oregon Tort Claims Act as that act had been applied in Kosikowski v. Bourne, 659 F2d 105 (9th Cir. 1981).

On December 1, 1981, Magistrate Hogan issued Findings and Recommendations in favor of dismissal of the second amended complaint, on the grounds that it was time barred under the con-

struction of the Oregon Tort Claims Act, ORS 30.275(8), and adopted by the Court of Appeals for the Ninth Circuit in Kosikowski, supra. (R. 46).

On January 8, 1982, the United States District Court for the District of Oregon, Belloni, J. affirmed the Findings and Recommendations and ordered that the second amended complaint be dismissed as barred by ORS 30.275(8). (R. 53). On January 11, 1982, the District Court entered Judgment for Defendants. (R. 54).

Petitioner appealed that judgment to the Court of Appeals for the Ninth Circuit which on May 31, 1983 issued a Memorandum Opinion affirming the District Court's dismissal.

REASONS FOR GRANTING CERTIORARI

1. The decision below conflicts with decisions of this Court as to the proper analysis to be used in determining the most analogous state statute of limitations to apply to an action arising under 42 U.S.C. § 1983.

2. The decision below conflicts with the decisions of other courts of appeals as to the proper analysis to be employed in determining the appropriate statute of limitations to be applied in an action arising under 42 U.S.C. § 1983.

3. The decision below raises a significant and possibly far reaching question concerning

the ability of the state to limit its liability for constitutional torts in a manner which so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AS TO THE PROPER ANALYSIS TO BE USED IN DETERMINING THE MOST ANALOGOUS STATE STATUTE OF LIMITATIONS TO APPLY TO AN ACTION ARISING UNDER 42 U.S.C. § 1983.

Pursuant to 42 U.S.C. § 1988, this court has determined that in applying a statute of limitations to actions brought under 42 U.S.C. § 1983 it is appropriate to "borrow" the most analogous state statute of limitations, O'Sullivan v. Felix, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed2d 980 (1914). Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed2d 440 (1980).

In determining which state statute of limitations is most appropriate a federal court is to examine the nature of the federal claim and the federal policies involved, Board of Regents v. Tomanio, supra; United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed2d 732 (1981); Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed2d 192 (1966). The characterization of an action for the purpose of selecting an appropriate statute of limitations is a question of federal

law, Auto Workers v. Hoosier, supra.

As stated by the Court of Appeals for the Third Circuit, selecting the appropriate state statute of limitations "requires characterization of the essential nature of the federal claim within the scheme created by the various state statutes of limitation." Davis v. United States Steel Supply, 581 F2d 335 (3rd Cir. 1978).

In affirming the dismissal by the United States Court for the District of Oregon the Court of Appeals for the Ninth Circuit relied on its earlier decision in Kosikowski v. Bourne, 659 F2d 105 (9th Cir. 1981). In Kosikowski, supra, the Court of Appeals for the Ninth Circuit failed to undertake any characterization of the claim and deferred entirely to a statement by the Oregon Legislature that a two-year statute of limitations applies to all actions brought under 42 U.S.C. § 1983, (ORS 30.265(1)). In deferring to the actions of the Oregon Legislature, the Court of Appeals for the Ninth Circuit failed to make any determination regarding what state statute of limitations would be most analogous to this action brought for the deprivation of life without due process of law. In so doing, the Court of Appeals for the Ninth Circuit failed to undertake the proper, or any, analysis to characterize the nature of the federal claim

as required by decisions of this court, United Parcel Service, Inc. v. Mitchell, supra; Auto Workers v. Hoosier, supra.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER ANALYSIS TO BE EMPLOYED IN DETERMINING THE APPROPRIATE STATUTE OF LIMITATIONS TO BE APPLIED TO AN ACTION ARISING UNDER 42 U.S.C. § 1983.

Decisions of the Courts of Appeals for the Third and Fourth Circuits are in conflict with the approach taken by the Court of Appeals for the Ninth Circuit in this case.¹

The Court of Appeals for the Third Circuit has determined that the "selection of the appropriate state limitations provision 'requires characterization of the essential nature of the federal claim within the scheme created by various state statutes of limitation'", Knoll v. Springfield Township School District, 699 F2d 137, 140 (3rd Cir. 1983), appeal pending, quoting, Davis v. United States Steel Supply, supra. In this case the

1. The Court of Appeals for the Eighth Circuit may also be in conflict with the Ninth Circuit, See, Garmon v. Foust, 668 F2d 400 (8th Cir. 1982) cert den, US , 102 S.Ct. 2283, 73 L.Ed2d 1294 (1982); Rosales v. Lewis, 454 F.Supp 956 (D.C.S.D. Iowa 1978).

Court of Appeals for the Ninth Circuit has not made any attempt to characterize the essential nature of the claim but has simply deferred to the Oregon Legislature.

The Court of Appeals for the Fourth Circuit has determined that "a state limitation period which evidences hostility or discrimination toward a federal cause of action will not be adopted by federal courts," Johnson v. Davis, 582 F2d 1316, 1318 (4th Cir. 1978). The fourth circuit had previously ruled that Virginia's two-year statute of limitations for personal injury would apply to § 1983 actions, Almond v. Kent, 459 F2d 200 (4th Cir. 1972). Following that decision the Virginia General Assembly enacted an amendment which purported to specifically limit the period of time during which actions arising under 42 U.S.C. § 1983 could be brought to one year. Just as Oregon has done in this case, the Virginia General Assembly attempted to provide a shorter statute of limitations for § 1983 actions than for an analogous tort action.

The Court of Appeals for the Fourth Circuit in Johnson refused to impose the one-year statute of limitations. In part the reason for that Court's refusal to impose the one year period of limitations was

"there is no rational basis for distinguishing between § 1983 actions and actions for injury to the person in light of the purposes for which statutes

of limitations are generally prescribed. These statutes are statutes of repose whose intent is to secure the prompt enforcement of claims during the lives of witnesses and when their recollection may be presumed to be still unimpaired. Campbell v. Haverhill, 155 US 610, 15 S.Ct. 217, 39 L.Ed 280 (1895). The facts to be proven, the witnesses to be called to testify, the evidence to be considered are generally the same for § 1983 actions as for state actions brought to compensate for the personal injury underlying the deprivation of federal constitutional rights." Johnson, supra at 1319.

Both the third and fourth circuits have recognized that in adopting statutes of limitations states attempt to balance two competing interests. These are: 1) the right to a remedy by plaintiffs who have been wronged by actions of others; and 2) the protection of the court system from the prosecution of stale claims. When the State of Oregon balanced these two factors, its determination was that in cases of wrongful death, plaintiffs should have three years in which to bring their actions, ORS 30.020(1). This is the statute of limitations which petitioner urges in this case. When considering its own liability for wrongful death, the State of Oregon limited actions to those brought within

two years. Private defendants in Oregon are subject to suit for three years from the date of their wrongful act, whereas the State of Oregon is only liable for two years for its wrongful act.

While it is appropriate to borrow a state's statute of limitations which has been wrought in the neutral forge of the state legislature governing disputes among its own citizens, it is inappropriate and inconsistent with the federal interests involved to adopt that statute of limitations which is designed solely to protect the state treasury. Just as in Johnson, ". . . absent some other reasonable basis for applying a shorter period of remedying a constitutional tort' than for remedying the underlying state tort, . . ." Johnson, supra at 1319, the Court of Appeals for the Ninth Circuit should have joined the third and fourth circuits and disregarded the special limitations placed on § 1983 actions by the Oregon Legislature.

3. THE DECISION BELOW RAISES A SIGNIFICANT AND POSSIBLY FAR REACHING QUESTION CONCERNING THE ABILITY OF A STATE TO LIMIT ITS LIABILITY FOR CONSTITUTIONAL TORTS IN A MANNER WHICH SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OR JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. At common law states were immune from suit by their own citizens through the doctrine of sovereign immunity. The state, as a defendant in an action under 42 U.S.C. § 1983, however, would stand in the same position as a private person because there would be no immunity, Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed2d 492 (1961).

The doctrine of sovereign immunity, while still available, has been waived by many states in certain instances with the enactment of what have come to be called tort claims acts. The sole purpose of these acts is to define the extent to which states have waived their immunity to suit. In its tort claims act the State of Oregon has waived its immunity to suit for wrongful death only to the extent that it will be liable if those actions are brought within two years. Thus the state is accorded favored treatment when compared with that of private defendants who are subject to actions for wrongful death for three years. This situation is perfectly legitimate within the context of the doctrine of sovereign immunity.

In grafting onto its tort claims act a statement that actions brought under 42 U.S.C. § 1983 shall be governed by that act the State of Oregon has attempted to waive what it never had -- immunity to suit from federal civil rights actions.

The Court of Appeals for the Ninth Circuit in this case has allowed this purported immunity to arise even though that court itself has held that congress "has never indicated an intent to engraft on to the federal rights state concepts of sovereign immunity or of states susceptibility to suit, which are the concepts that are the roots of the California Tort Claims Act. Indeed, the history of Section 1983, summarized in Monroe v. Pape, supra, 375 US 167, 81 S.Ct. 473, 5 L.Ed2d 492, vividly demonstrates that state concepts of sovereign immunity were alien to the purposes to be served by the Civil Rights Act." Donovan v. Reinbold, 433 F2d 738, 742 (9th Cir. 1970).

Although the State of Oregon has not claimed complete immunity to suit for the deprivation of life without due process of law it has granted itself partial immunity through the device of limiting the bringing of that action to two years under the Tort Claims Act. Absent the Oregon Tort Claims Act, the State of Oregon would be subject to suit for three years. Through the device of the Oregon Tort Claims Act the State has granted itself a one year immunity to suit.

This device, if allowed to stand, would significantly hamper the ability of citizens

to enforce federal rights against the state. If the Oregon Legislature is allowed to establish this partial immunity and thereby protect its treasury the device will be quickly recognized by other states seeking to frustrate the enforcement of federal rights. Accepting the decision of the Court of Appeals for the Ninth Circuit in Kosikowski and in this case invites the states to rely on the concepts of sovereign immunity, a concept foreign to federal civil rights actions, and frustrate the enforcement of federal rights.

In addition, the holding of the Court of Appeals for the Ninth Circuit has further confused the application of state statutes of limitation in the U.S. Court for the District of Oregon. That court has read Kosikowski to extend the statute of limitations in the Oregon Tort Claims Act to apply to actions brought against private defendants under 42 U.S.C. § 1981, Loiseau v. Department of Human Resources, 558 F.Supp 521 (D.C. Or 1983).

B. In this case the Court of Appeals for the Ninth Circuit relied on its opinion in Kosikowski v. Bourne, supra. That opinion evidences a fundamental misunderstanding of the ordered relations between the states and the federal government. Since the opinion in this case was a memorandum opinion only it is nece-

ssary to refer to Kosikowski to understand the court's reasoning. In that opinion the court says "this precise expression of the intent of the Oregon Legislature makes unnecessary a resort to a characterization of appellant's cause of action in the manner employed by this court in, Clark v. Musick, 623 F2d 89 (9th Cir. 1980)." Kosikowski, supra at 107.

Subsequently the court holds: "We must accept the decision of the Oregon Legislature to apply the two year statute of limitations to § 1983 actions" Kosikowski, supra at 107 (emphasis added).

In Kosikowski it is evident that the Court of Appeals for the Ninth Circuit is under the impression that it was compelled to follow the dictates of the Oregon Legislature. 42 U.S.C. § 1988 admonishes the courts to turn to "the common law, as modified and changed by the constitution and the statutes of the [forum] state" so long as it is "not inconsistent with the constitution and laws of the United States." As stated in Knoll v. Springfield Township School District, ". . . when poured into the federal vessel, the state statute becomes a federal legal precept, and all aspects of the proceedings must be measured by the federal interests implicated in the case. Knoll, supra at 141.

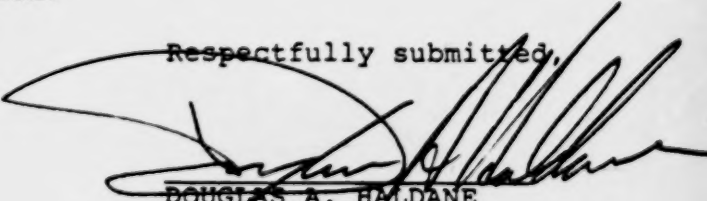
If the decisions of the Court of Appeals for the Ninth Circuit in this case and in Kosikowski are allowed to stand it will imply a power on the part of the states to dictate the extent to which federal rights will be protected in the federal courts.

Oregon's statutory scheme has created a favored position for the state and is thus discriminatory against those seeking to enforce their federal rights.

CONCLUSION

WHEREFORE, Petitioner prays that this court issue its writ of certiorari to the Court of Appeals for the Ninth Circuit to review that court's decision.

Respectfully submitted,



DOUGLAS A. HALDANE
Counsel of Record
for Petitioner
P.O. Box 11544
Eugene, OR 97440

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHY SHIRILLA, as Personal Repre-	) Filed
sentative of the Estate of Donald	) May 31, 1983
Andrew Taylor, Deceased,	) Phillip B.
	) Winberry
Plaintiff-Appellant,	) Clerk, U.S.
	) Court of
vs.	) Appeals
)
CLAY SMALLWOOD, et al.,	) No. 82-3050
	) DC CV 81-6005
Defendant-Appellee.	) MEMORANDUM

Appeal from the United States District Court
for the District of Oregon The Honorable
Robert C. Belloni, District Judge Presiding
Argued and Submitted on May 5, 1983

BEFORE: CHOY and CANBY, Circuit Judges, and
MARQUEZ*, District Judge

The district court correctly held that
this case was controlled by Kosikowski v.
Bourne, 659 F.2d 105 (9th Cir. 1981). Or.
Rev. Stat. § 30,275 (3) is the statute of
limitations applicable to all § 1983 actions
including those seeking recovery for violations
resulting in death. We therefore affirm.

*The Honorable Alfredo Marquez, United
States District Judge for the District of
Arizona, sitting by designation.

A-2

Jan 8, 1982

Robert M. Christ, Clerk

By Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KATHY SHIRILLA, as Personal)
Representative of the Estate))
of Donald Andrew Taylor,)
Deceased,)

Plaintiff,)

vs.)

CLAY SMALLWOOD, et al,)

Defendants.)

CIVIL NO. 81-6005

ORDER

I have made a de novo review of those portions of Magistrate's findings and recommendation to which objection has been made.

I fully agree with the Magistrate's recommended disposition and affirm.

IT IS ORDERED that this action is dismissed. The Clerk is directed to enter judgment accordingly.

DATED: January 8, 1982.

United States District
Judge

U.S. District Court
District of Oregon
Southern Division

FILED

Dec - 1 1981

ROBERT M. CHRIST, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KATHY SHIRILLA, as Personal
Representative of the Estate
of Donald Andrew Taylor,
Deceased,

Civil No.
81-6005-E

Plaintiff,

FINDINGS AND
RECOMMENDATION

vs.

CLAY SMALLWOOD, Sheriff,
Curry County;
TED HAWKINSON, Deputy Sheriff,
Curry County;
GARY FINLEY, Deputy Sheriff,
Curry County;
GERRY RISTE, Deputy Sheriff,
Curry County;
VERLON DENTON, Deputy Sheriff,
Curry County;
THOMAS HENDERSON, Deputy Sheriff,
Curry County;
SAM DOTSON, City Police Officer,
City of Brookings;
ROBERT SEHLANDER, Deputy District
Attorney, Curry County;
WILLIAM WALLACE, District Attorney,
Curry County;
FRED HUNT, Deputy Sheriff,
Curry County;
DONALD SMITH, Police Officer,
Oregon State Police;
STATE OF OREGON;
CURRY COUNTY;
CITY OF BROOKINGS;

Defendants.

In her second amended complaint, plaintiff seeks damages pursuant to 42 U.S.C. § 1983 and the Oregon Wrongful Death Act, ORS 30.020, 30.075.

Plaintiff's action is based on the events which led to Donald Taylor's death on January 13, 1978. Plaintiff filed her original complaint on January 12, 1981. At that time, the statute of limitations recognized by this court for § 1983 actions was two years, based on ORS 12.110. Six months after plaintiff filed her complaint, the Ninth Circuit imposed a six-year limitations period on § 1983 actions. See Clark v. Musick, 623 F.2d 89 (9th Cir. 1980). Plaintiff filed her amended complaint (March 25, 1981) and second amended complaint (July 28, 1981) well within the six-year period. Two months ago, the Ninth Circuit reconsidered Clark, and ruled that the applicable statute of limitations for § 1983 actions filed in Oregon is again two years, based on the limitation period in the Oregon Tort Claims Act. See ORS 30.275(3); Kosikowski v. Bourne, 659 F.2d 106 (9th Cir. 1981). Accordingly, plaintiff's 42 U.S.C. § 1983 claims are time-barred.

Plaintiff argues that this court should apply the three-year statute of limitations

in ORS 30.020(1), apparently because her constitutional claims arise from an alleged wrongful death. As stated in Kosikowski, the Oregon Legislature clearly intended the Oregon Tort Claims statute to apply to 42 U.S.C. § 1983 actions. The wrongful death limitation period would be applicable only if this court had pendent jurisdiction. Once the federal claim is dismissed, this court does not have jurisdiction over the state claim. Accordingly, I find that the proper statute filing period is two years, and that this action should be dismissed as time barred.

DATED this 23rd day of November, 1981.

MICHAEL R. HOGAN
U.S. Magistrate